

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

JENNIFER PIGGOTT and)
SLADE PIGGOTT,)
)
Plaintiffs,)
)
v.)
)
Case No.: CV-06-1158-F
GRAY CONSTRUCTION, INC.,)
)
)
Defendant/Third-Party Plaintiff,)
)
v.)
)
COOPER'S STEEL FABRICATORS,)
INC., ALL-SOUTH)
SUBCONTRACTORS, FREELAND-)
HARRIS CONSULTING ENGINEERS)
OF KENTUCKY, INC., FREELAND)
HARRIS CONSULTING ENGINEERS)
OF GEORGIA, INC., THE HARDY)
CORPORATION, LATTA PLUMBING)
& CONSTRUCTION CO., INC.,)
HWASHIN AMERICAN)
CORPORATION and FIRESTONE)
BUILDING PRODUCTS)
COMPANY, LLC,)
)
Third-Party Defendants.)

**RESPONSE TO HWASHIN'S REPLY AND MOTION TO STRIKE A PORTION OF
LATTA'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO SEVER**

COMES NOW Latta Plumbing & Construction Co., Inc. ("Latta Plumbing"), a Third-Party Defendant in the above-captioned matter, and hereby responds to Hwashin's Reply and Motion to Strike a Portion of Latta's Brief in Opposition to Plaintiffs Jennifer and Slade Piggott's Motion to Sever (Doc. No. 157).

Hwashin in its Motion to Strike and its Reply speaks of two separate issues. The first being Hwashin's Motion to Amend the Complaint in Intervention and the second being realignment. While Latta Plumbing did not previously seek to file a response to Hwashin's Motion to Amend the Complaint in Intervention, it was necessary for Latta Plumbing to express its understanding of how the parties are currently aligned in order to accurately address the Plaintiffs' Motion to Sever.

A. Hwashin's Motion to Strike a Portion of Latta Plumbing's Opposition is due to be denied.

Rule 12(f) of the Federal Rules of Civil Procedure provides that "the court may order stricken from any pleading any insufficient defense or redundant, immaterial, impertinent, or scandalous matter." (Emphasis added.) Rule 7(a) of the Federal Rules of Civil Procedure provides that a "pleading" is only a "complaint," "answer," "reply to a counterclaim," "answer to a cross-claim," "third-party complaint," "third-party answer," or "reply to an answer or a third-party answer." A response to a motion to sever is therefore not a "pleading." *Burns v. Lawther*, 53 F.3d 1237, 1241 (11th Cir. 1995) (per curium) (only the items listed in Rule 7(a) constitute pleadings); Order of U.S. District Judge Myron Thompson, November 20, 2001; *Bozeman v. Orum, et al.*, CV-00-1368, Doc. 122 (D.C. for 11th Cir.) (response to a motion for summary judgment is not a pleading); *Powell v. Fidelity Nat. Financial, Inc.*, 2003 WL 22134854 (D.C.Cal. 2003) (motion to strike Rule 12(b)(6) motion is not a Rule 7 pleading); *O'Connor v. Nevada*, 507 F.Supp. 546 (D.C.Nev. 1981) (a motion to strike only concerns striking matters from the pleadings and a motion to dismiss was not a pleading and could not be struck); 2 James Wm. Moore, et al., *Moore's Federal practice* §12.37[2] (3rd ed. 1997) ("Only material including in a 'pleading' may be the subject of a motion to strike..."). Accordingly, Hwashin's Motion to Strike a Portion of Latta's Brief in Opposition to Plaintiffs' Motion to Sever is due to be denied.

B. Latta Plumbing only addressed current alignment of the parties, not realignment.

As previously stated, Latta Plumbing in its Brief in Opposition to Plaintiffs' Motion to Sever acknowledged how the parties are currently aligned (ie. the position of the parties today prior to this Honorable Court having made any rulings on the pending motions.) Latta Plumbing avers that Hwashin is currently a third party defendant, while Hwashin alleges that it is an intervenor as is reflected by the fact that Hwashin filed a Motion to Amend the Complaint in Intervention rather than filing a motion for realignment. Should this Court rule that Hwashin is in fact a third party defendant and not an intervenor, given that it was the Alabama Worker's Compensation Fund and not Hwashin that filed the original Complaint in Intervention, Hwashin's proper vehicle in order to obtain plaintiff status would be to file a motion for realignment. However, because we are not to that juncture of the litigation and Hwashin has not filed a motion for realignment, Latta Plumbing did not seek to address said topic in its Brief in Opposition to Plaintiffs' Motion to Sever.¹

WHEREFORE, the above premises considered, Latta Plumbing respectfully requests that this Honorable Court DENY Hwashin's Motion to Strike a Portion of Latta's Opposition to Plaintiffs Jennifer and Slade Piggott's Motion to Sever.

Respectfully submitted,

/s/ Felicia A. Long

Thomas T. Gallion, III (ASB-5295-L74T)
 Constance C. Walker (ASB-5510-L66C)
 Felicia A. Long (ASB-5532-F61L)
 Attorneys for Third-Party Defendant Latta
 Plumbing & Construction Co., Inc.

¹ Latta Plumbing opposes a potential motion for realignment given that Hwashin's interests are not clearly aligned with that of the Plaintiffs' interests. Hwashin is possibly a responsible party in this action pursuant to the Third Party Complaint. Plaintiffs most likely would have asserted claims against Hwashin in its Complaint had it not been barred from doing so under the workers' compensation exclusivity remedy statute.

OF COUNSEL:

HASKELL SLAUGHTER YOUNG & GALLION, LLC

305 South Lawrence Street

P.O. Box 4660

Montgomery, Alabama 36103-4660

Telephone: (334) 265-8573

Facsimile: (334) 264-7945

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of November 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system that will send notification of such filing to the following parties or counsel:

Attorneys for Plaintiffs Jennifer and Slade Piggott

Jere L. Beasley

Julia Ann Beasley

BEASLEY, ALLEN, CROW, METHVIN, PORTIS & MILES, P.C.

Post Office Box 4160

Montgomery, Alabama 36103-4160

(334) 269-2343

(334) 954-7555

Attorneys for Gray Construction, Inc.

E. Britton Monroe

Mickey B. Wright

Brian M. McClendon

LLOYD, GRAY & WHITEHEAD, P.C.

2501 20th Place South, Suite 300

Birmingham, Alabama 35223

(205) 967-8822

(205) 967-2380 Fax

Attorneys for Hwashin America Corp.

W. Christopher Waller, Jr.

James A. Rives

BALL, BALL, MATTHEWS & NOVAK

Post Office Box 2148

Montgomery, Alabama 36102-2148

(334) 387-7680

(334) 387-3222

Attorney for Hwasin America Corp.

Linda H. Ambrose
ROGERS & ASSOCIATES
3000 Riverchase Galleria
Suite 650
Birmingham, Alabama 35244
205-982-4620
205-982-4630 Fax

Attorneys for Hwashin America Corp.

Joseph Lister Hubbard
Richard H. Allen
Arden Reed Pathak
CAPELL HOWARD, P.C.
Post Office Box 2069
Montgomery, Alabama 36102-2069
(334) 241-8000
(334) 323-8888

Attorney for Freeland-Harris Consulting Engineers of Kentucky, Inc.

Charles Keith Hamilton
BAINBRIDGE MIMS ROGERS & SMITH
Post Office Box 530886
Birmingham, Alabama 35253-0886
205-879-1100
205-879-4300 Fax

Attorneys for Cooper's Steel Fabricators, Inc.

Albry Joe Peddy
Robert B. Stewart
SMITH SPIRES & PEDDY, P.C.
2015 Second Avenue North
Suite 200
Birmingham, Alabama 35203
205-251-5885
205-251-8642 Fax

Attorney for The Hardy Corporation

Larry W. Harper
PORTERFIELD, HARPER, MILLS & MOTLOW, P.A.
Post Office Box 530790
Birmingham, Alabama 35253-0790
(205) 980-5000
(205) 980-5001 Fax

Attorney for All-South Subcontractors, Inc.

John S. Somerset
SUDDERTH & SOMERSET
5385 First Avenue North
Birmingham, Alabama 35212
(205) 595-4631
(205) 595-4632 Fax

Attorneys for Freeland Harris Consulting Engineers of Georgia, Inc.

John M. Laney, Jr.
John C. DeShazo
LANEY & FOSTER, P.C.
Post Office Box 43798
Two Perimeter Park South
Suite 426E
Birmingham, Alabama 35243-0798
(205) 298-8440
(205) 298-8441 Fax

Attorneys for Firestone Building Products Company, LLC

Brittin T. Coleman
Kenneth M. Perry
Hope T. Cannon
BRADLEY ARANT ROSE & WHITE LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, Alabama 35203-2014
(205) 521-8000
(205) 521-8800 Fax

/s/ Felicia A. Long
OF COUNSEL

28856
02391-828